

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* TYE, Minor.

UNPUBLISHED  
September 22, 2016

No. 331890  
Jackson Circuit Court  
Family Division  
LC No. 14-002893-NA

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Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

The trial court terminated respondent's parental rights to the minor child finding clear and convincing evidence that (1) 182 days or more after the first dispositional order, the conditions that led to the adjudication continued to exist without reasonable likelihood of being rectified within a reasonable time considering the child's age, MCL 712A.19b(3)(c)(i); (2) other conditions exist of which respondent received notice, hearing, and recommendations with a reasonable opportunity to rectify the conditions and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age, MCL 712A.19b(3)(c)(ii); and (3) a reasonable likelihood exists that the child will be harmed if returned to respondent's home, MCL 712A.19b(3)(j). The trial court also found it would be in the child's best interests to terminate respondent's parental rights. MCL 712A.19b(5). Respondent-mother appeals by right. We affirm.

The minor child was taken into custody, and a neglect petition filed by Child Protective Services (CPS) of the Department of Health and Human Services (DHHS), on October 21, 2014. The child was left alone and unsupervised from October 15 to October 17, 2014. Respondent reported that she was addressing stress by using marijuana and crack cocaine. An order of adjudication was entered on December 2, 2014, and a dispositional order entered on December 29, 2014, required respondent to participate in various services as outlined in a treatment plan, including completing substance abuse counseling, attending NA meetings, completing a parenting class, and participating in random drug screening. After numerous hearings, the trial court held a termination trial.

Respondent argues on appeal that the trial court's order terminating parental rights violated her constitutional right to parent her child. Specifically, respondent contends that her parental rights were terminated simply because she was in jail, which is an insufficient ground for termination of parent rights. Respondent also asserts that the trial court erred by not extending the proceedings to fully evaluate placing the child with the child's aunt. Respondent

does not otherwise assert error in the trial court's findings regarding statutory grounds for termination or that termination of her parental rights was not in the child's best interests.

Respondent did not assert in the trial court the claim that her constitutional rights to substantive or procedural due process were violated. Thus, these claims are not preserved. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Respondent did preserve her claim that the child should have been placed with her sister as an alternative to terminating her parental rights.

In general, in a child protective proceeding, whether the trial court has complied with a parent's substantive and procedural due process rights is a question of law that this Court reviews de novo. *Id.* In this case, because the claimed constitutional error is unpreserved, this Court's review is limited to plain error affecting respondent's substantial rights. *Id.*; see also *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

This Court reviews the trial court's factual findings supporting termination of parental rights for clear error. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if this Court is definitely and firmly convinced that the trial court made a mistake. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A trial court's decision that termination is in the best interests of the children is also reviewed for clear error. *In re Trejos*, 462 Mich at 356-357.

Although respondent has a constitutionally protected liberty interest to parent her child, *In re Sanders*, 495 Mich 394, 409; 852 NWd2 524 (2014), she does not explain how her right to procedural due process was violated by the trial court's taking jurisdiction of the child and eventually terminating her parental rights. The state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of minor children, and may, after affording neglectful parents minimal due process, take custody of the neglected children. *Id.* at 409-410. When the state proves a statutory ground for termination is established by clear and convincing evidence, "the liberty interest of the parent no longer includes the right to custody and control of the children." *In re Trejo*, 462 Mich at 355. In this case, respondent was accorded procedural due process because she had notice, an opportunity to be heard at numerous hearings, and she makes no claim that the trial court was not impartial. *In re TK*, 306 Mich App at 703. Respondent has failed to establish plain error affecting her substantial rights. *Id.*

Respondent's substantive due process right protects her from the arbitrary termination of her parental rights. *In re TK*, 306 Mich App at 706. "The person claiming a deprivation of substantive due process must show that the action was so arbitrary as to shock the conscience." *Id.* at 708. The only argument that respondent presents regarding arbitrariness is her claim that the trial court terminated her parental rights simply because she was in jail, citing *In re Mason*, 486 Mich at 160. First, while *Mason* holds that incarceration alone is not a sufficient basis to terminate parental rights, that holding was based on rights provided by statute and court rule, not on the basis of constitutional due process. *Id.* at 166. Moreover, the record in this case establishes respondent's incarceration was not the only or even the primary basis for terminating respondent's parental rights. Rather, respondent's two periods of incarceration during the pendency of this case were the result of respondent's choosing to engage in substance abuse and criminal behavior instead of maintaining sobriety and engaging in programming to regain custody of her child. Pending adjudication, respondent tested positive for cocaine and was arrested for

violating her district court probation for which she was sentenced to 93 days in jail. Respondent was released from jail the day after entry of the dispositional order at the end of December 2014. She had ample opportunity to engage in substance abuse prevention and other programming to create a stable home for herself and the child. Instead, by March 2015 she tested positive for cocaine, by May 2015 she was observed breaking into parked vehicles, and by July 22, 2015, she was again arrested for drug offenses. She was sentenced for the last offense on October 15, 2015, and according to respondent's own admissions, she chose a straight jail sentence over one of probation coupled with substance abuse rehabilitation.

In sum, the trial court did not terminate respondent's parental rights simply because she was in jail. Rather, the trial court terminated respondent's parental rights on the basis of finding clear and convincing evidence that 182 days or more after the first dispositional order the conditions that led to the adjudication continued to exist without reasonable likelihood of those conditions being rectified within a reasonable time considering the child's age. MCL 712A.19b(3)(c)(i). The conditions that led to the adjudication were that respondent had a history of substance abuse, of being in and out of jail, and of abandoning her child so she could lead a life style of using marijuana and crack cocaine. Those conditions continued to exist 182 days after the first dispositional order with respondent still abusing drugs, committing crimes, and when arrested because of her criminal behavior, choosing straight jail time over probation and rehabilitative programming. Given the testimony of respondent's probation officer concerning respondent's lengthy history of substance abuse and repeated failure at rehabilitative programs, the trial court did not clearly err in finding that the conditions that "that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." *Id.* Because petitioner proved a statutory ground for termination by clear and convincing evidence, "the liberty interest of [respondent] no longer includes the right to custody and control of the child[]." *In re Trejo*, 462 Mich at 355. It follows that the state did not arbitrarily terminate respondent's parental rights and did not violate her substantive due process rights. *In re TK*, 306 Mich App at 706, 708.

Although respondent does not specifically argue that the trial court clearly erred by finding that termination of her parental rights was in the child's best interests, MCL 712A.19b(5), she does argue that the trial court erred by not fully evaluating placement of the child with his aunt as an alternative to terminating her parental rights. "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *In re Mason*, 486 Mich at 161 n 11. Unlike in *Mason*, however, in this case the trial court did consider placement of the child with his aunt. When the child first came into care, DHHS reported to the court that the aunt's home was unsuitable for placement. When respondent raised the issue again during the termination trial, DHHS reported that the aunt's home had again been investigated and was still unsuitable for placement. Neither respondent nor her sister came forward with any contrary evidence. Consequently, the trial court did not clearly err by deciding not to delay the termination trial or by not further considering placing the child with his aunt as an alternative to terminating respondent's parental rights. Because there is no evidence of a suitable relative willing to accept placement of the child, the trial court did not err by failing to pursue that option.

In sum, respondent had a significant constitutional liberty interest in the care and custody of her child, of which the state could not interfere without due process of law. *In re Sanders*, 495 Mich at 409-410. But the record in this case demonstrates that respondent was provided

procedural due process—notice and a meaningful opportunity to be heard by an impartial decision-maker—and respondent’s parental substantive due process rights were not violated by their arbitrary termination. *In re TK*, 306 Mich App at 706. Rather, clear and convincing evidence proved by the existence of at least one statutory ground for termination of respondent’s parental rights,<sup>1</sup> MCL 712A.19b(3)(c)(i), and similarly proved that termination of respondent’s parental rights was in the child’s best interests, MCL 712A.19b(5). Consequently, respondent’s parental liberty interest must yield to the state’s legitimate interest in protecting the child’s welfare. *In re Sanders*, 495 Mich at 409-410; *In re Trejos*, 462 Mich at 355.

We affirm.

/s/ Stephen L. Borrello  
/s/ Jane E. Markey  
/s/ Michael J. Riordan

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<sup>1</sup> Only one statutory ground for termination need be proved, *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), so we decline to address the trial court’s findings regarding two other statutory grounds for termination, *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).